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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

SUSAN JARRATT et al., Plaintiffs and Respondents, v. MAXIM N. BACH, Defendant and Appellant.	C038336 (Super. Ct. No. 121830)

A jury awarded plaintiffs Susan Jarratt, Mark Orme, Dorothy Richins, Colleen Hamblin and Terry Hamblin total damages of $369,000 in their malicious prosecution action against defendant Maxim N. Bach.

Bach appeals in propria persona, asserting (1) the statute of limitations barred plaintiffs' action; (2) the underlying proceeding did not terminate favorably; (3) there was probable cause to file the underlying action; (4) there was insufficient evidence to support a finding of malice; (5) there was insufficient evidence to support an award of compensatory or

punitive damages; (6) the court erroneously excluded a defense expert witness and improperly limited cross-examination of another witness; (7) instructional error occurred; and (8) the trial court was biased.

None of these claims has merit, and we therefore affirm the judgment.

FACTS AND PROCEEDINGS

The five plaintiffs are parents of students at Gridley High School. At the time of the underlying lawsuit, the high school had two Spanish teachers, Mr. Dolan and Mr. Medina. When the school board decided not to renew Dolan's contract, many parents and students appeared at a school board meeting on March 27, 1996, in support of Dolan. All of the plaintiffs except Terry Hamblin attended this meeting and addressed the board.

Plaintiff Mark Orme asked whether the board would be hiring a replacement "because if not, for [his] family, the alternative was not an option." He did not refer to Medina by name or offer any explanation for his comment, but he believed that his son would not be treated fairly by Medina.

Plaintiff Susan Jarratt advised the board that she thought Dolan should be retained. She stated that she "felt that [Dolan] was a very excellent teacher because [her] daughter had taken Spanish from him for that year and she was able to speak Spanish where [her] son had taken two years from Mr. Medina and he was not able to use Spanish at all."

Plaintiff Dorothy Richins told the board that Dolan was an excellent teacher. She added, "I don't know why everyone is saying the alternative about Mr. Medina, but he is not an alternative for us. If you have daughters, you know what I mean." She did not explain this comment at the meeting, but was referring to a rumor that Medina favored girls who wore short skirts and acted "very friendly" toward him.

Plaintiff Terry Hamblin did not attend the meeting, but urged his wife, Colleen, to attend. Plaintiff Colleen Hamblin told the board that Dolan was willing to help her daughter with Spanish even though her daughter was enrolled "in the other teacher's class."

Medina did not attend the school board meeting, but read a newspaper account of the meeting. Two teachers told Medina that parents and students had made derogatory comments about him to the board. One of these teachers made some written notes about who had said what, and Medina took this document and his concerns to his union. The union sent a letter to some of the plaintiffs warning them against defaming Medina.

Approximately one month after the board meeting, plaintiff Susan Jarratt told the high school superintendent that she did not think it was appropriate for Medina to supervise the Spanish Club because he took the club out of town. Jarratt had learned that Medina had fathered a child with a former student while he was married to someone else.

In August 1996, Medina consulted with Bach, an attorney, about suing plaintiffs. Medina paid Bach a $5,000 retainer fee and signed a contingent fee agreement.

Bach knew Medina had not been at the school board meeting, but he did not talk to anyone who had been present or otherwise investigate the factual basis for Medina's claims. However, on December 13, 1996, Bach filed a complaint in federal court, asserting plaintiffs and school board members (including one board member Bach knew had not been at the meeting) acted as conspirators in violating Medina's federal civil rights. The complaint alleged Medina had suffered injury to his reputation and also mental and emotional distress and sought compensatory damages in a total amount of $350,000 and $250,000 in punitive damages from each defendant. The complaint also alleged causes of action for intentional infliction of emotional distress, defamation, interference with business interest, and negligence.

The parents and school board members filed a motion to dismiss. The parents asserted in part that Medina's claim that they had violated the federal Civil Rights Act, 42 United States Code section 1983 (section 1983), was not viable because they had not acted under color of law in speaking at the school board meeting.

Minutes before Medina's deposition in February 1997, he told Bach that he had fathered a child with a former student. At that point, Bach determined that the lawsuit was not viable. However, Bach consciously decided not to dismiss the suit and instead continued to oppose plaintiffs' motion to dismiss. Bach

also learned that Terry Hamblin had not been at the March 27, 1996 meeting, but he did not amend the complaint to dismiss him from the lawsuit.

On April 17, 1997, Judge Lawrence K. Karlton dismissed the Medina complaint, ruling in part that Medina's "[section] 1983 claims must be dismissed as to the individual parent defendants since these defendants did not act under color of state law. Next, California law requires the Board to allow public comment at Board meetings on any issue within its subject matter jurisdiction, including criticism of a public employee." Judge Karlton found no basis for any of Medina's federal claims, dismissed them, and declined to retain supplemental jurisdiction over the state law claims.

Medina did not pursue any claims in state court.

On April 17, 1998, plaintiffs filed a complaint for malicious prosecution against Bach. Medina was also named as a defendant but after he filed for bankruptcy, he was severed from the case. Medina is not involved in this appeal.

Plaintiffs asserted that Bach acted without probable cause in filing a federal lawsuit against plaintiffs because Bach did not conduct "the most rudimentary investigation," which would have revealed, among other things, that plaintiffs had not acted under color of law.

At trial, plaintiffs described their involvement (or noninvolvement) at the board meeting, and testified they suffered emotional distress as a result of the lawsuit Bach filed. They were very worried about potential financial

liability. Others in the community read about the lawsuit in the local newspapers and often questioned plaintiffs about it, causing plaintiffs embarrassment and humiliation.

The jury found for plaintiffs and awarded compensatory damages of $75,000 to Terry Hamblin and $50,000 to each of the other four plaintiff. In a subsequent proceeding, the jury awarded punitive damages of $22,000 to Terry Hamblin and $18,000 to each of the other plaintiffs, for a total damage award (compensatory and punitive) of $369,000.

This appeal followed.

DISCUSSION

A plaintiff asserting a cause of action for malicious prosecution must establish that the prior action (1) was commenced by or at the direction of the defendant, (2) was legally terminated in the plaintiff's favor, (3) was brought without probable cause, and (4) was initiated with malice. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871.)

We discuss these requirements more fully in the context of Bach's claims. We note, however, that Bach's brief does not comply with California Rules of Court, rule 14(a)(1)(B), which requires each point to be addressed in a separate heading with appropriate argument. Instead, Bach buries multiple issues within a single heading. We do not consider these arguments. (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345, fn. 17.)

I

Statute of Limitations

Reiterating a claim that was repeatedly rejected by the trial court, Bach contends that plaintiffs' complaint was time-barred because it was brought more than one year after the court orally dismissed the federal civil rights claim against plaintiffs. Bach focuses on the wrong event as triggering the limitations period.

"A plaintiff has one year from the date of accrual in which to file a malicious prosecution action. [Citations.] A cause of action for malicious prosecution accrues 'at the time of entry of judgment on the underlying action in the trial court; i.e., at the time of successful termination of the prior proceeding.'" (*Bob Baker Enterprises, Inc. v. Chrysler Corp.* (1994) 30 Cal.App.4th 678, 683.)

Here, Judge Karlton apparently announced his decision to dismiss the underlying federal lawsuit on April 14, 1997, he signed the order on April 15, 1997, and the order of dismissal was entered on April 17, 1997. Plaintiffs filed their complaint for malicious prosecution exactly one year later, on April 17, 1998.

Bach asserts the limitations period expired on April 14, 1998; one year after the court announced its decision. Bach contends it is that announcement that triggered the statute of limitations because the subsequent acts of signing and entering the order were simply ministerial in nature.

Bach offers no authority to support his novel suggestion that an oral announcement of an order starts the clock on the limitations period. Cases relied upon, such as *Spellis v. Lawn* (1988) 200 Cal.App.3d 1075, stand for the unremarkable proposition that a statute of limitations begins to run upon the occurrence of the last element essential to the cause of action, whether or not all damages have been sustained by that time. (*Id.* at pp. 1079-1081.) Similarly, federal cases cited by Bach, such as *National Distrib. Agency v. Nationwide Mut. Ins. Co.* (9th Cir. 1997) 117 F.3d 432, 433-434 and *Gerritsen v. De La Madrid Hurtado* (9th Cir. 1987) 819 F.2d 1511, 1514-1515, hold that, in some situations, an order dismissing a complaint may be intended as an order disposing of an action and may therefore be final and appealable. But none of the cited state or federal cases suggests that a statute of limitations begins to run before an order or judgment is actually entered.

In fact, such a rule would be contrary to the generally understood principle that it is the entry of an order or judgment that gives it effect. "In no case is a judgment effectual for any purpose until entered." (Code Civ. Proc., § 664.) "The purpose of the rule is clear: It would be manifestly undesirable to allow judgments [or orders] to be used or enforced without any official evidence of their terms. The rule goes further, however; until entry, the judge can vacate or change his previously rendered judgment as he sees fit." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 51, p. 581.) The same is true of orders, which can be modified until filed

and entered as part of the minutes or as a formal written order. (See generally Code Civ. Proc., § 1003; 7 Witkin, Cal. Procedure, *supra*, Judgment, § 55, pp. 584-585.)

Only with the entry of an order or judgment is there a definitive ruling that can trigger the running of a statute of limitations. It is the entry that marks finality to a court's decision.

In arguing to the trial court that it was Judge Karlton's oral pronouncement that ought to control, Bach suggested that accrual of a cause of action might be unreasonably delayed if a clerk does not file the judgment or order in a timely manner. However, a remedy for such a problem is readily available through a writ of mandamus to compel entry of judgment. (7 Witkin, Cal. Procedure, *supra*, Judgment, § 51, p. 582.)

Here, plaintiffs' complaint for malicious prosecution was filed one year after the date the federal action was terminated in their favor. Judge Karlton's order was entered April 17, 1997, and plaintiffs' complaint was filed April 17, 1998, within the limitations period. The complaint was timely. (*Bob Baker Enterprises, Inc. v. Chrysler Corp., supra*, 30 Cal.App.4th at p. 683.)

II

Favorable Termination

In order to establish a cause of action for malicious prosecution, there must be a favorable termination of the prior action. (See *Sheldon Appel Co. v. Albert & Oliker, supra*, 47

Cal.3d at p. 871.) Pointing out that Judge Karlton's ruling dismissed only the cause of action for violation of federal civil rights provisions and did not reflect on the validity of state claims for defamation and other torts, Bach contends there was no favorable termination to support plaintiffs' claim for malicious prosecution. He is incorrect.

"'[I]n order for the termination of lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit.' . . . [¶] However, a '"favorable" termination does not occur merely because a party complained against has prevailed in an underlying action. . . . If the termination does not relate to the merits--reflecting on neither innocence of nor responsibility for the alleged misconduct--the termination is not favorable in the sense it would support a subsequent action for malicious prosecution.' [Citation.] Thus, a 'technical or procedural [termination] as distinguished from a substantive termination' is not favorable for purposes of a malicious prosecution claim." (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 341-342.)

The validity of the state tort claims alleged in Bach's earlier complaint against plaintiffs is irrelevant to the subsequent malicious prosecution action because it was not those claims that plaintiffs contended were maliciously prosecuted. Rather, the focus was Bach's filing of a federal civil rights claim against plaintiffs. A malicious prosecution case may be

maintained following a partial favorable termination of a severable cause of action. (*Paramount General Hospital Co. v. Jay* (1989) 213 Cal.App.3d 360, 363, 371-372.)

Judge Karlton stated the claim under section 1983 "must be dismissed as to the individual parent defendants since these defendants did not act under color of state law."

Unlike dismissals based on the statute of limitations or other technical defects (see *Casa Herrera, Inc. v. Beydoun, supra*, 32 Cal.4th at p. 342), this ruling is substantive in nature and reflects a lack of merit in Bach's claim against plaintiffs. Bach could not state a cause of action for violation of federal civil rights because the parents did not act under color of state law. Section 1983 provides: "Every person who, *under color of any statute . . . of any State* . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." (Italics added.)

Action taken under color of state law is not a procedural technicality; it is at the core of a viable civil rights claim. If there is no action under color of law, there can be no federal civil rights violation. Judge Karlton ruled that the parents did not act under color of state law, and he therefore dismissed that cause of action. This dismissal was on the merits and reflects plaintiffs' innocence of the wrongful conduct alleged. (*Casa Herrera, Inc. v. Beydoun, supra,* 32 Cal.4th at pp. 341-342.) It therefore constitutes a favorable

termination for purposes of a subsequent malicious prosecution action.

III

Probable Cause

Bach contends that he had probable cause to file the federal civil rights claim against plaintiffs and that the trial court erred in concluding otherwise. We do not agree.

The existence or absence of probable cause in a malicious prosecution action is a question of law to be determined by the court. (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 875.) "The question whether, on a given set of facts, there was probable cause to institute an action requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors, and courts have recognized that there is significant danger that jurors may not sufficiently appreciate the distinction between a merely unsuccessful and a legally untenable claim." (*Ibid.*)

"Modified to the malicious prosecution context, the [probable cause] standard is 'whether any reasonable attorney would have thought the claim tenable' [citation], a standard that is satisfied if the issues presented in the underlying action were arguably correct, even if it was extremely unlikely the client would win." (*Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 66.)

Bach contends this standard was met because he was entitled to rely on information given to him by his client, Medina, and

because "the school board had no authority to hold an open session on the terminated Spanish teacher, Mr. Dolan, wherein Medina could be embarrassed and maligned by defamatory remarks of individuals members of the public like the [plaintiffs] herein."

These arguments miss the point. The critical question is not whether Bach had probable cause to believe plaintiffs defamed his client or whether the school board acted improperly. Instead, as the trial court noted, the relevant question in the context of this malicious prosecution action is whether Bach had probable cause to believe plaintiffs acted under color of law, thereby justifying the filing of a federal civil rights claim under section 1983. None of Bach's arguments addresses this point.

Bach had no facts to support a section 1983 action against the parents. Although that complaint alleged that there was a conspiracy between the school board and the parents, which might demonstrate that the parents acted under color of law, there was no evidence to support this claim. Bach argued only that the parties must have conspired because the board permitted the parents to speak in public session. This speculative reasoning is not evidence. Moreover, as Judge Karlton noted in his decision dismissing the federal lawsuit, "California law requires the Board to allow public comment at Board meetings on any issue within its subject matter jurisdiction, including criticism of a public employee." (See *Baca v. Moreno Valley Unified Sch. Dist.* (C.D.Cal. 1996) 936 F.Supp. 719, 726-738;

Leventhal v. Vista Unified Sch. Dist. (S.D.Cal. 1997) 973 F.Supp. 951, 956-961; Gov. Code, § 54954.3, subd. (a) [right to public comment].)

The mere fact that plaintiffs spoke up at the board meeting does not mean that the board and plaintiffs conspired or that plaintiffs otherwise acted under color of law. No reasonable attorney would have thought otherwise, and the trial court properly concluded that the section 1983 claim that Bach brought against plaintiffs lacked probable cause.

At oral argument, Bach pointed out that his complaint had also included a claim for discrimination under 42 U.S.C. section 1981 (section 1981), which does not have the same color-of-law requirement. Citing *Maduka v. Sunrise Hosp.* (9th Cir. 2004) 375 F.3d 909, he contends that he pleaded this cause of action with sufficient specificity to demonstrate probable cause, and therefore the judgment must be reversed. Bach ignores one critical fact: the defendants who were the subject of Bach's section 1981 claim are not the parties who sued Bach for malicious prosecution.

Section 1981 guarantees people "the full and equal benefit" of all laws, and protects "against impairment by nongovernmental discrimination and impairment under color of State law." Bach contends that paragraph No. 7 of his complaint alleged a claim under section 1981 by asserting that the Gridley school board allowed Medina to be defamed at a school board meeting only because of Medina's ethnicity. But this claim has nothing to do with the ensuing malicious prosecution action, which was not

brought by the school board but by the individual parents of students. The section 1981 claim had nothing to do with them and did not form the basis for their malicious prosecution action. It is therefore irrelevant for purposes of this case whether Bach had probable cause to bring a section 1981 claim against the school board.

IV

Substantial Evidence

Several of Bach's remaining claims on appeal are assertions that the jury's verdicts were contrary to the evidence presented at trial. Because Bach fails to acknowledge the appropriate standard of review, we reiterate these well-established principles.

"A challenge in an appellate court to the sufficiency of the evidence is reviewed under the substantial evidence rule. [Citations.] '"Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." [Citation.]' [Citations.]

"Moreover, we defer to the trier of fact on issues of credibility. [Citation.] '[N]either conflicts in the evidence nor "'testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" [Citations.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., "'unbelievable *per se*,'" physically impossible or "'wholly unacceptable to reasonable minds.'" [Citations.]'" (*Lenk v. Total-Western*, Inc. (2001) 89 Cal.App.4th 959, 968.)

A. Malice

Bach contends there is no substantial evidence to support a finding of malice. Again, we disagree.

"The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and past cases establish that the defendant's motivation is a question of fact to be determined by the jury." (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 874.) The extent of an attorney's investigation and research may be considered in determining whether the attorney acted with malice. (*Id.* at p. 883.)

"Malice means actual ill will or some improper purpose, whether express or implied. [Citations.] It may range anywhere from open hostility to indifference. [Citations.] Malice may

also be inferred from the facts establishing lack of probable cause. [Citation.] [¶] To infer malice from the evidence supporting lack of probable cause, the parties' prefiling behavior must have been clearly unreasonable." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1465-1466.) Greater culpability is required to demonstrate malicious prosecution than would be required in a case alleging negligence. (*Id.* at p. 1466.)

Rhetorically, Bach asks and answers, "How can [Bach] have improper motive or purpose prior to filing the lawsuit when his own client (Mr. Medina) has totally mislead [*sic*] him regarding the core of his lawsuit--defamation--by not telling [Bach] about his sexual history? Obviously, he cannot, and to have allowed the issue of malice to go to the jury was contrary to the law, reversible error and a denial of [Bach's] right to due process."

Again, Bach's focus is misplaced. The issue of malice does not turn on whether Medina was fully forthcoming with Bach. As we have already explained, the malicious prosecution action centered on Bach's filing of a lawsuit charging plaintiffs with violating Medina's federal civil rights under section 1983, and it is in that context that malice must be examined. Bach's lack of research as to both facts and law was glaringly apparent. He alleged a conspiracy between the parents and the board members without any facts to support that claim. There was absolutely no evidence that the parents acted under color of law, making any section 1983 claim untenable.

Moreover, malice is apparent even under the framework outlined by Bach. Bach presents a myopic view of the facts, ignoring the evidence presented and the various ways in which Bach's conduct exhibited malice. Medina had not been at the board meeting and could tell Bach few specifics about who had said what. Yet Bach did not talk to anyone who had been present before filing the complaint. He named as defendants a parent and school board member who had not attended the meeting. Additionally, Bach acknowledged that the lawsuit was no longer viable when he learned previously undisclosed information just prior to Medina's deposition. Despite this knowledge, Bach did not dismiss the lawsuit but instead continued to litigate. This stands in stark contrast to the situation in *Grindle* in which "less than thorough factual research" did not demonstrate malice because the attorney "had filed the lawsuit in a good faith belief it had merit and [almost immediately] discontinued the lawsuit upon realizing it was without merit." (*Grindle v. Lorbeer, supra*, 196 Cal.App.3d at p. 1467.)

Bach's subsequent knowledge also presents issues related to probable cause. In *Zamos v. Stroud* (2004) 32 Cal.4th 958, the California Supreme Court held that an attorney may be held liable for malicious prosecution when he properly commences a lawsuit but then continues to prosecute it after discovering it is not supported by probable cause.

In addition to the obvious lack of probable cause, plaintiffs also presented evidence to suggest that Bach filed this action for purposes of financial gain and publicity. Their

evidence overwhelmingly established that Bach acted with malice in filing the Medina lawsuit. Bach's claim to the contrary is without merit.

B. Compensatory Damages

Bach contends there was insufficient evidence to support an award of compensatory damages. We reject his contention.

"A reviewing court must uphold an award of damages whenever possible [citation], and all presumptions are in favor of the judgment." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61.) "[T]he measure of compensatory damages for the malicious prosecution of a civil action includes . . . compensation for emotional distress, mental suffering and impairment to reputation proximately caused by the initiation and prosecution of the action." (*Id.* at p. 59.) The amount of compensation to be awarded for such damages is left to the discretion of the jury, unless it is so disproportionate to the harm suffered as to raise the presumption that it resulted from passion or prejudice. (*Id.* at pp. 64-65; *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 419.)

Much of Bach's argument concerns the level of certainty required to recover for future damage. But plaintiffs did not seek future damages. They sought only noneconomic damages for the loss of reputation and emotional distress they had already incurred.

Bach asserts that these damages are unrecoverable because plaintiffs did not introduce any evidence or witnesses to

demonstrate that they lost stature in the community as a result of the federal lawsuit. He notes that plaintiffs had commented that they thought the lawsuit was a "joke," and that plaintiffs were able to enjoy Christmas even though they were served with the complaint only days earlier. According to Bach, any stress was short-lived and transitory.

Again, Bach fails to take the entire record into account. There is no set standard by which to compute the value of emotional distress. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1067-1068, fn. 17.) Plaintiffs described the tumult in their lives caused by the Medina lawsuit. They testified that they were extremely worried when named as defendants in a lawsuit seeking hundreds of thousands of dollars. The trauma of litigation and the possibility of financial devastation were often on their minds. The lawsuit was difficult to forget about because Gridley is a small community and many people brought the matter up to them in conversation.

The fact that plaintiffs celebrated the holidays or stated that they first thought the lawsuit was a joke does not mean that they did not suffer emotional distress. Bach apparently believes that emotional distress must be manifest 24 hours a day, seven days a week to warrant recovery. That is not the case.

Bach points out that plaintiffs had other stressful events occurring in their lives and therefore he cannot be held responsible for plaintiffs' damages. At trial, plaintiffs readily acknowledged these other stresses, but also

distinguished their effects from those caused by the filing of the federal lawsuit. The court instructed the jury that one of the issues to be decided was whether "the actions of the defendant cause[d] the plaintiff to suffer injury, damage, loss, or harm." If it answered that answer in the affirmative, it was then to award damages "in an amount that will reasonably compensate that plaintiff for all loss or harm, provided that you find it was suffered by that plaintiff and was caused by the defendant's conduct." These instructions clearly informed the jury that emotional distress damages could be awarded only for damages caused by Bach, and not for distress rooted in other events.

Bach asserts that plaintiffs could have mitigated their damages by telling people that Medina's lawsuit was dismissed. This argument is unpersuasive. First, it is difficult to fathom how requiring a party to initiate conversation about a stressful subject could possibly reduce emotional distress. But in any event, Bach repeatedly raised this claim to the jury, and the jury may in fact have reduced the amount of damages it might otherwise have awarded. Under either scenario, Bach cannot establish error.

Finally, Bach asserts that "no reasonable or rational explanation is possible as to why [plaintiff Terry Hamblin] received an additional $25,000" in damages. Bach overlooks or chooses to ignore the fact that Terry Hamblin did not even attend the board meeting where the allegedly defamatory comments were made. The jury could properly conclude that Terry Hamblin

suffered more distress than the other plaintiffs and award him greater damages.

Contrary to Bach's contention, the plaintiffs met their burden of establishing their damages. The jury's compensatory damage awards are supported by substantial evidence.

C. Punitive Damages

Bach asserts the award of punitive damages was contrary to the evidence and violated due process. We disagree.

We review the entire record to determine whether there is substantial evidence to support the jury's award of punitive damages. The jury has wide discretion in making such an award, and our review is deferential. (*George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 816.)

The court instructed the jury on "[w]hether punitive damages should be imposed, and if so, the amount thereof, is left to your sound discretion, exercised without passion or prejudice. [¶] If you determine that punitive damages should be assessed against a defendant, in arriving at the amount of such an award, you must consider: [¶] (1) [t]he reprehensibility of the conduct of the defendant; (2) [t]he amount of punitive damages which will have a deterrent effect on the defendant in the light of the defendant's present financial condition; [and] (3) [t]hat the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff."

Bach contends he was denied due process because "the facts and jury instructions did not comport with the law as laid down by the U.S. Supreme Court" in S*tate Farm Mut. Ins. v. Campbell* (2003) 538 U.S. 408 [155 L.Ed.2d 585] (*State Farm*). Bach does not explain how a trial court in 2001 was to anticipate a decision issued more than two years later.

More importantly, the standards set forth in *State Farm* have little bearing here. Unlike *State Farm* or *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [134 L.Ed.2d 809], also cited by Bach, this is not a case in which the punitive damage award grossly exceeded compensatory damages. In *State Farm*, for example, the ratio of punitive to general damages was 145-to-1. (*State Farm, supra,* 538 U.S. at p. 426 [155 L.Ed.2d at p. 606].) Here, in contrast, punitive damages constituted only a small portion of plaintiffs' recovery. The jury awarded compensatory damages of $50,000 and punitive damages of $18,000 to each of four plaintiffs, and compensatory damages of $75,000 and punitive damages of $22,000 to the fifth.

Bach notes that the jury was not instructed that any award of punitive damages was to take into account Bach's net worth. However, the court conveyed the same standard by instructing that the jury must consider "[t]he amount of punitive damages which will have a deterrent effect on the defendant in the light of the defendant's present financial condition." Evidence was presented concerning Bach's assets and liabilities, enabling the jury to make an appropriate damage award.

Contrary to Bach's claim, the jury did not punish Bach for conduct other than that at issue here. Because punitive damages serve a deterrent function (*State Farm, supra,* 538 U.S. at p. 416 [155 L.Ed.2d at p. 600]), there was nothing improper in plaintiffs' arguments that punitive damages were necessary to prevent future similar conduct.

Bach asserts without any explanation that "the jury was not instructed properly on 'reprehensibility of the defendant's conduct,' which is the 'most important indicium of the reasonableness of a punitive damages award.'" Bach's claim has no basis in fact. The court explicitly instructed the jury that if determined that punitive damages were proper, the amount of such an award must consider "[t]he reprehensibility of the conduct of the defendant." There was no error.

The punitive damages awarded were neither grossly excessive nor arbitrary. Substantial evidence supports the jury's determination. There was no error.

V

Instructional Error

Bach raises several claims of instructional error, none of which has merit.

First, he faults the trial court for failing to instruct the jury on causation and burden of proof. Again, there is no basis for Bach's claim. Bach is correct that the court refused to give BAJI No. 3.76 ("Cause-Substantial Factor Test"), but that instruction applies to negligence cases. The court covered

the issues of causation and burden of proof in other instructions. It outlined the elements of a cause of action for malicious prosecution, including that "[t]he malicious actions of the defendant caused the plaintiff to suffer injury, damage, loss, or harm." In another instruction, the court emphasized that one of the questions to be decided by the jury was whether "the actions of the defendant cause[d] the plaintiff to suffer injury, damages, loss, or harm." In instructing the jury on damages, the court reiterated that damages could be awarded "for all loss or harm, provided that you find it was suffered by that plaintiff and was caused by the defendant's conduct." Contrary to Bach's claim, there was no need for the court to define the term "caused" for the jury.

The court also instructed the jury that plaintiffs bore the burden of proof on each of the elements of their claim for malicious prosecution, including establishing that Bach caused their damages. Bach's claim to the contrary is without foundation.

Bach contends the court erred in refusing to give BAJI No. 14.60 ("Speculative Damages not Permitted"). There was no need to instruct on the need for certainty of future damages because plaintiffs sought to recover only for damages that had already been incurred.

Bach asserts the court erred in refusing to give 15 proposed special instructions, arguing only that these instructions "should have been given in view of the substantial evidence [he] had presented supporting his theories of defense

and of the case." This conclusory statement, made without citation to facts or authority, warrants no discussion. (*Santa Teresa Citizen Action Group v. State Energy Resources Conservation & Development Com.* (2003) 105 Cal.App.4th 1441, 1451; Cal. Rules of Court, rule 14(a)(1)(B).)

Bach offers several arguments relating to the lack of instruction on mitigation of damages. As previously discussed, he believes that plaintiffs could have minimized their damages had they publicized the fact that the federal lawsuit was dismissed. Bach offers no authority to support imposing such a duty on plaintiffs. And, as we noted, such an obligation might well increase, not mitigate, plaintiffs' emotional distress.

Bach also faults the court for failing to instruct the jury on mitigation of damages in the punitive damages phase of trial "in that [plaintiffs] by their conduct before the school board provoked Medina to litigate his rights to stop them from defaming him." Again, Bach offers no authority to support the novel claim that speaking out at a school board meeting constitutes provocation warranting an instruction on mitigation of damages. We sincerely doubt any such authority exists.

Bach contends the court erred in failing to instruct the jury during the punitive damages phase of trial that plaintiffs bore the burden of establishing Bach's financial condition. While no explicit instruction on this point was given, the court reminded the jury that it had previously been instructed how to consider and evaluate the evidence, and gave those written instructions to the jury for use in deliberations. Those

instructions informed the jury that plaintiffs bore the burden of proof on all elements of its case, including damages. In any event, plaintiffs in fact introduced evidence of Bach's assets and liabilities, thereby meeting their burden of establishing Bach's financial condition. Again, there was no error.

VI

Miscellaneous Rulings

Bach challenges two other rulings by the trial court.

First, he contends the court erred in refusing to permit him to call an attorney as an expert witness to testify about the probable cause and malice elements of a malicious prosecution action. The court properly excluded this testimony.

As already discussed, the issue of probable cause is a question of law. Consequently, no expert witnesses may be presented on this subject. (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 884.)

The trial court concluded that expert testimony was not needed on the question of malice because this was not a subject beyond the expertise of the jury. That ruling was correct.

"The general test for the admissibility of expert testimony is the question of whether the testimony concerns a subject 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citation.] On appeal, the trial court's decision as to whether expert testimony meets this standard for admissibility is subject to review for an

abuse of discretion." (*People v. Johnson* (1993) 19 Cal.App.4th 778, 786-787; see also Evid. Code, § 801, subd. (a).)

The court's instructions defined "malice" and "malicious" as "a wish to vex, annoy, or injure another person. Malice means that subjective attitude or state of mind, which actuates the doing of an act for some improper or wrongful motive or purpose. It does not necessarily require that the defendant be angry or vindictive or bear any actual hostility or ill will toward the plaintiffs. [¶] Malice, like any other fact, may be proved by direct or circumstantial evidence. . . ."

The trial court properly concluded that expert testimony on the issue of malice was not required. This matter was not beyond the common experience of the jury.

In a second point, Bach contends the court erred in precluding him from cross-examining plaintiffs about previously claimed attorney fees. Bach asserted this cross-examination was relevant to impeach plaintiffs' credibility. The court found this line of questioning irrelevant because plaintiffs had abandoned any claim for economic damages. After further explanation of the fee issue from plaintiffs' attorney and argument from both counsel, the court reiterated its conclusion that this evidence was irrelevant. It added: "Additionally, under [section] 352 of the Evidence Code, the Court finds that however probative that evidence might be, [it] is well outweighed by the consumption of time that would be taken, and that it would also be confusing to the jury."

The court acted well within its discretion in making this determination. (See *People v. Valdez* (2004) 32 Cal.4th 73, 108.) Economic damages were not at issue in this trial, and the question of whether inconsistent statements were made about attorney fees would have been time-consuming and confusing to the jury. There was no error in excluding this evidence.

VII

Bias of Trial Court

Bach contends that Judge Howell, the trial judge, should have disqualified himself because he "was biased and prejudiced against [Bach] and assumed an advocacy role for [plaintiffs]." (See Code Civ. Proc., §§ 170.1, subd. (a)(6)(C), 170.3.) This claim of bias centers on Bach's belief that the trial court ruled against him on numerous occasions because Bach campaigned for the opponent of Judge Howell's wife in a November 2000 judicial contest. Pointing to a declaration that he filed challenging Judge Howell's impartiality, Bach asserts that because the trial judge did not file a sworn reply, Judge Howell must be deemed disqualified. (See Code Civ. Proc., § 170.3, subd. (c)(4).)

This declaration was filed as part of Bach's motion for new trial, *after* trial had concluded. Although Bach accused the trial judge of bias at the beginning of trial, he never filed a written motion to disqualify Judge Howell.

A motion for disqualification must be filed as soon as practical after the discovery of the facts constituting the

ground for disqualification. (Code Civ. Proc., § 170.3, subd. (c)(1).) Bach's electioneering efforts occurred in November 2000. Bach knew before trial began that he had publicly campaigned for the opponent of Judge Howell's wife and that Judge Howell would preside over the malicious prosecution trial, but he did not file a motion for disqualification. Bach's claim of bias is untimely. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1206-1207.)

More importantly, the record does not reflect any bias on the part of the trial court. To the contrary, Judge Howell handled this trial with remarkable patience and even-handedness. Bach's claim to the contrary is utterly without merit.

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal, if any were incurred.

HULL, J.

We concur:

DAVIS, Acting P.J.

ROBIE, J.